

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

**Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600**

<http://www.montgomerycountymd.gov/content/council/boa/board.asp>

Case No. A-6066

PETITION OF RANDY A. AND MICHELE LEVENSON

(Hearing held April 27, 2005)

OPINION OF THE BOARD

(Effective date of Opinion, June 10, 2005)

This proceeding is a petition pursuant to Section 59-A-4.11(b) of the Zoning Ordinance (Chap. 59, Mont. Co. Code 1994, as amended) for variances from Sections 59-C-1.323(a) and 59-C-1.323(b)(1). The petitioners propose the construction of a carport addition that requires a variance of 9.16 feet as it is within forty-three (43) feet of the established front building line and a variance of seven (7) feet as it is within five (5) feet of the side lot line. The required established building line is 52.16 feet and the required side lot line setback is twelve (12) feet.

James Demma, Esquire, represented the petitioners at the public hearing.

The subject property is Lot 32, Block B, Lake Normandy Estates Subdivision, located at 11614 Karen Drive, Potomac, Maryland, 20854, in the R-200 Zone (Tax Account No. 1000881598).

Decision of the Board: Requested variances **granted**.

EVIDENCE PRESENTED TO THE BOARD

1. The petitioners propose the construction of a 14 x 21.4 foot carport addition.
2. Mr. Demma stated that that the petitioners' property is a long, narrow lot, which narrows from front to back. Mr. Demma stated that this characteristic is shared with the neighboring properties and that new construction can not be located elsewhere on the property. See Exhibit No. 10 [subdivision plat].
3. Mr. Demma stated that the addition, as proposed, would provide a sheltered access to a side door of the residence that is the house's only ground-level entrance. Mr. Demma stated that Mr. Levenson has a degenerative joint disease and needs a safe, level access to his

home. The record contains letters from the petitioner's physician. Dr. Abend's letter of December 20, 2004 states "Mr. Levenson has significant problems with instability and osteoarthritis in the lateral compartment of both of his knees. At some point, he is going need to have a knee replacement performed." Dr. Abend's letter of April 26, 2005 states "I have been treating Mr. Levenson for bilateral knee collapse. Considering the condition of his knees, in my medical opinion, the addition of a covered entrance could be helpful in the prevention of future slips and falls." See, Exhibit Nos. 7 and 14 [Letters dated 12/20/04 and 4/26/05 from Jeffrey A. Abend, M.D.].

4. The petitioner testified that his property is a pie-shaped lot, which has a two-tiered topography. The petitioner testified that the topography in the rear yard is steeply sloped and that the lot's topography also slopes from side to side. The petitioner testified that the house is located on the only level area on the lot and that the location of the existing driveway does not permit the construction of a covered structure in that area. Photographs of the subject property were entered into the record as Exhibit No. 16.

STANDARDS FOR EVALUATION

Based on the petitioner's binding testimony and the evidence of record, the Board finds as follows:

The requested variance does not comply with applicable standards and requirements of the Montgomery County Zoning Ordinance set forth in Section 59-G-3.1. However, the Board finds that the variances can be granted as a reasonable accommodation to the petitioner's disability under Title II of the Americans With Disabilities Act (ADA) and the Fair Housing Amendments Act of 1988 (FHAA) provisions.

Determination of Disability

The ADA and FHAA define a person's disability, or handicap, in pertinent part, as "a physical or mental impairment that substantially limits one or more of the major life activities of (an) individual." 24 U.S.C.A. §12102(2)(A); 42 U.S.C. §3602(h).

Whether an individual has an impairment and whether the impairment substantially limits a major life activity is to be determined on a case-by-case basis. *Dadian v. Village of Wilmette*, 269 F.3d 831, 837 (7th Cir.2001) (citations omitted).

Prohibition on Housing Discrimination Base on Disability

The FHAA and Title II of the ADA prohibit housing discrimination based on an individual's handicap or disability.

The FHAA prohibit discrimination against "any person in the terms, conditions or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling" on the basis of the person's handicap. 42 U.S.C.A.

§3604(f)(2). The FHAA definition of discrimination includes a refusal to make reasonable accommodations in “rules, policies, practices or services when such accommodation may be necessary to afford” a person with a handicap “equal opportunity to use and enjoy a dwelling.” 42 U.S.C.A. §3604(f)(3)(B). A “necessary accommodation” to afford “equal opportunity” under FHAA will be shown where, but for the accommodation, the disabled person seeking the accommodation “will be denied an equal opportunity to enjoy the housing of their choice.” [See *Trovato v. City of Manchester, N.H.*, 992 F.Supp. 493, 497 (D.N.H. 1997) (citing *Smith & Lee Assocs. V. City of Taylor*, 102 F3d 781, 795 (6th Cir. 1996).] A failure to make a reasonable accommodation need not be supported by a showing of discriminatory intent. [See *Trovato*, 992 F. Supp. At 497 (citing *Smith*, 102 F.3d at 794-96).]

Reasonable Accommodation by Local Government of an Individual's Disability

The “reasonable accommodation” provision of the FHAA has been interpreted to require municipalities to “change, waive, or make exceptions in their zoning rules to afford people with disabilities the same opportunity to housing as those who are without disabilities.” [See *Trovato*, 992 F. Supp. At 497 (citing *Hovsons, Inc. v. Township of Brick*, 89 F3d 1096, 1103 (3rd Cir. 1996)).] Similarly, Title II of the ADA (42 U.S.C.A. §12132) has been held to apply zoning decisions, which constitute an “activity” of a public entity within the meaning of the ADA. [See, *Mastandrea v. North*, 361 Md. 107, 126, 760 A.2d 677, 687, at n.16 (citing *Trovato*, 992 F.Supp. at 497).]

Under the ADA, a local jurisdiction is required to reasonably modify its policies when necessary to avoid discrimination on the basis of disability, unless it is shown that the modifications “would fundamentally alter the nature of the service, program or activity.” 28 C.F.R. §35.130(b)(7) (1997). Therefore, unless the proposed accommodation would “fundamentally alter or subvert the purposes” of the zoning ordinance, the variance must be granted under Title II of the ADA. [See *Trovato*, 992 F.Supp. at 499.]

Findings of the Board

Based on the above, the Board must make the following findings:

1. Determination of disability: An evaluation of whether a disability exists under the ADA or FHAA requires a three-step analysis. The applicant's medical condition must first be found to constitute a physical impairment. Next, the life activity upon which the applicant relies must be identified (i.e. walking, independent mobility) and the Board must determine whether it constitutes a major life activity under the ADA and FHAA. Third, the analysis demands an examination of whether the impairment substantially limits the major life activity. *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

2. Non-discrimination in housing: The Board must find that the proposed variance constitutes a reasonable accommodation of existing rules or policies necessary to afford a disabled individual equal opportunity to use and enjoy a dwelling.

3. Reasonable modification of local government policies: Because zoning ordinances are among the varieties of local government rules subject to Title II of the ADA and the FHAA, the Board must find that the proposed variance must be granted in

order to avoid discrimination on the basis of disability unless the proposed accommodation would fundamentally disrupt the aims of the zoning ordinance.

Applying the above analysis to the requested variances, the Board finds as follows:

1. The Board finds that the need for assistance with general mobility demonstrates that a major activity of the petitioner's life is restricted. Because of the direct impact of this impairment has on the petitioner's major life activity, the Board finds that a disability exists pursuant to the definitions in the ADA and FHAA. The Board finds that the proposed construction of a carport addition would permit the petitioner a safe access to his home and constitutes a reasonable modification.

2. The Board finds that the proposed construction of a carport addition, which is designed as an open frame structure, will allow the structure to be readily dismantled in the future.

Therefore, based upon the petitioner's binding testimony and the evidence of record, the Board finds that the grant of the requested variances is a reasonable accommodation of the petitioner's disability because (1) it will not fundamentally alter or subvert the purposes of the zoning ordinance; (2) the proposed construction is necessary to permit the petitioner secure movement from his house to his automobile; and (3) the proposed structure can be easily removed when no longer required for the petitioner's use.

Accordingly, the requested variances of 9.16 feet from the required 52.16 foot established front building line and of seven (7) feet from the required twelve (12) foot side lot line setback are **granted** subject to the following conditions:

1. The petitioner shall be bound by all of his testimony and exhibits of record, and the representations of his attorney, to the extent that such evidence and representations are identified in the Board's Opinion granting the variances.
2. Construction must be completed according to plans entered in the record as Exhibit Nos. 4(a) and 4(b) and 5(a) through 5(d).
3. The variances are granted to the petitioner only, and the carport addition shall be removed at such time as it is no longer required in relation to petitioner's medical condition or the petitioner no longer resides on the property.

The Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland, that the Opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.

On a motion by Angelo M. Caputo, seconded by Donna L. Barron, with Louise L. Mayer, Wendell M. Holloway and Allison Ishihara Fultz, Chair, in agreement, the Board adopted the foregoing Resolution.

Allison Ishihara Fultz
Chair, Montgomery County Board of Appeals

I do hereby certify that the foregoing
Opinion was officially entered in the
Opinion Book of the County Board of
Appeals this 10th day of June 2005.

Katherine Freeman
Executive Secretary to the Board

NOTE:

See Section 59-A-4.53 of the Zoning Ordinance regarding the twelve (12) month period within which the variance granted by the Board must be exercised.

The Board shall cause a copy of this Opinion to be recorded among the Land Records of Montgomery County.

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date of the Opinion is mailed and entered in the Opinion Book (see Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure.